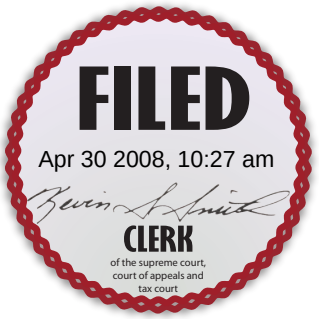

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IN THE
COURT OF APPEALS OF INDIANA

FERNANDO R. RAMIREZ,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A03-0711-CR-556
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0607-FA-55

April 30, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-Defendant Fernando R. Ramirez ("Ramirez") appeals his sentence for two counts of Dealing in Methamphetamine, as Class A felonies,[1] and one count each of Dealing in Cocaine, as a Class A felony,[2] and Dealing in Marijuana, as a Class C felony.[3] We affirm.

Issues

Ramirez presents two issues for review:

I. Whether the forty-five year sentence imposed for the second count of Dealing in Methamphetamine is inappropriate; and

II. Whether the trial court erroneously imposed consecutive sentences.

Facts and Procedural History

On June 22, 2006, a confidential informant working with the Elkhart County Interdiction and Covert Enforcement Unit purchased 28.8 grams of methamphetamine from Ramirez for $900. One week later, the confidential informant and Ramirez engaged in a like transaction. Drug interdiction officers executed a search warrant at Ramirez's residence and seized packaging material, digital scales, fourteen grams of amphetamine, 124 pounds of marijuana, more than two pounds of cocaine, and $38,000 in U.S. currency.

On July 3, 2006, the State charged Ramirez with two counts of Dealing in Methamphetamine and one count each of Dealing in Cocaine, Dealing in Amphetamine,[4] and Dealing in Marijuana. On August 2, 2007, pursuant to a plea agreement, the State moved to dismiss the Dealing in Amphetamine count and Ramirez pleaded guilty to the remaining

[1] Ind. Code § 35-48-4-1.1.
[2] Ind. Code § 35-48-4-1.
[3] Ind. Code § 35-48-4-10(a)(2)(C) – (b)(2).

counts.

The plea agreement between the State and Ramirez provided that sentencing would be left to the discretion of the trial court, except that sentences for Counts II, III and V would be concurrent.

On September 13, 2007, the trial court sentenced Ramirez as follows: twenty-five years for Count I (Dealing Methamphetamine), forty-five years for Count II (Dealing Methamphetamine), twenty-five years for Count III (Dealing Cocaine), and four years for Count V (Dealing Marijuana). The sentences imposed for Count I and Count III were consecutive, for an aggregate sentence of fifty years. This appeal ensued.

Discussion and Decision

I. Appellate Rule 7(B) Sentence Review

Ramirez claims that the forty-five year sentence imposed for Count II, Dealing in Methamphetamine, is inappropriate. In particular, he emphasizes his efforts at rehabilitation, his decision to plead guilty, the minor nature of his prior criminal convictions, and the fact that the trial court imposed a mitigated sentence for Count I, Dealing in Methamphetamine.

The advisory sentence for a Class A felony is thirty years. See Ind. Code § 35-50-2-4. Ramirez requests that we reduce his sentence in accordance with Indiana Appellate Rule 7(B), which provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender."

The character of the offender is such that he entered this country illegally and failed to

[4] Ind. Code § 35-48-4-2.

lead a law-abiding life thereafter. He has a history of multiple misdemeanor convictions. He also admitted to drug use, illegal conduct that had not resulted in convictions. Ramirez has recently indicated a willingness to benefit from rehabilitative efforts. He pursued a GED and volunteered to work as a translator. However, these choices are in response to his most recent incarceration. After prior incarcerations, Ramirez did not seek education and employment but rather chose to make his living dealing drugs.

Ramirez decided to plead guilty, which saved the State the expense of a trial. A guilty plea demonstrates a defendant's acceptance of responsibility for the crime and at least partially confirms the mitigating evidence regarding his character. Cotto v. State, 829 N.E.2d 520, 525 (Ind. 2005). Indiana courts have recognized that a defendant who pleads guilty deserves to have mitigating weight extended to the guilty plea in return, but it is not automatically a significant mitigating factor. Davis v. State, 851 N.E.2d 1264, 1268 n.5 (Ind. Ct. App. 2006), trans. denied. Here, Ramirez had already received a significant benefit in exchange for his guilty plea, because Count IV, Dealing in Amphetamine, a Class B felony, was dismissed.

The nature of the offense at issue is that Ramirez sold methamphetamine to a confidential informant after having made a similar sale one week earlier. In sum, the character of the offender and the nature of the offense do not suggest a mitigated sentence.

In the guise of a Rule 7(B) argument, Ramirez suggests he is entitled to a reduction of his sentence for Count II to match the twenty-five-year mitigated sentence imposed for Count I, an offense substantially similar to Count II. The trial court was not prohibited from

imposing a sentence within the statutory range but above the advisory term for Count II simply because it elected to impose a different sentence (also within statutory parameters) for Count I. See Indiana Code Section 35-38-1-7.1(d) (providing "A court may impose any sentence that is authorized by statute and permissible under the Constitution of the State of Indiana."). Rule 7(B) requires an examination of the character of the offender and the nature of the offense for which the sentence is under review. The Rule does not invoke a corollary review of equivalency of sentences. Ramiez has not persuaded us that his forty-five-year sentence is inappropriate.

II. Consecutive Sentences

Ramirez presents a two-fold challenge to his consecutive sentences. First, he claims that the trial court could not legally impose a mitigated sentence and then order it to be served consecutive to another sentence. Second, he claims that consecutive sentences were improper because all of his convictions arose from a single police sting.

Mitigated Consecutive Sentence

Ramirez relies upon Marcum v. State, 725 N.E.2d 852 (Ind. 2000) and its progeny. In Marcum, the Court determined that, where the aggravating and mitigating circumstances are in balance, "there is no basis on which to impose consecutive sentences." Id. at 864. Subsequently, in Wentz v. State, 766 N.E.2d 351 (Ind. 2002), the Court remanded with instructions to the trial court to impose concurrent sentences for all counts where the trial court had "twice stated the mitigating and aggravating factors were in balance." Id. at 359.

In order to impose consecutive sentences, the trial court must find at least one aggravating circumstance. Frentz v. State, 875 N.E.2d 453, 470 (Ind. Ct. App. 2007), trans. denied. Here, the trial court found both aggravators and mitigators, but did not state that the factors were in equipoise or that the mitigators outweighed the aggravators. In imposing the individual sentences, the trial court recognized the following aggravators: Ramirez was in this country illegally, he had prior misdemeanor convictions, he failed to appear for a hearing in this case, he lacked ties to the community (including employment), he used illegal drugs and prior rehabilitative efforts had failed to deter him from crime.

When ordering Count I to be served consecutive to Count III, the trial court observed that Count I and Count III involved different drugs. As such, the trial court considered an additional circumstance when imposing consecutive sentences. Even if a trial court has stated that aggravators and mitigators are in equipoise but then considers an additional free-standing aggravating factor to impose consecutive sentences, the initial finding of balance does not serve to invalidate the consecutive nature of the sentences. Lopez v. State, 869 N.E.2d 1254, 1259 (Ind. Ct. App. 2007), trans. denied. See also Frentz, 875 N.E.2d at 472 (finding no basis for holding that a trial court is restricted to a one-step balancing process when sentencing a defendant for multiple crimes).

The consecutive sentences imposed upon Ramirez are not invalidated because one of the sentences was mitigated.

Police Sting

Ramirez next directs our attention to Beno v. State, 581 N.E.2d 922 (Ind. 1991),

which limited sentences imposed to punish participants in State sponsored repetitive drug buys. In Beno, the police arranged for a confidential informant to purchase cocaine from Beno at his residence on two different occasions. Id. at 923. Beno was then convicted of two counts of dealing in cocaine and one count of maintaining a common nuisance. Id. During the sentencing hearing, Beno was sentenced to the maximum term of imprisonment on each of the three convictions with each term to be served consecutively, for a total of seventy-four years imprisonment. Id.

Our Supreme Court found Beno's sentence manifestly unreasonable. Specifically, it found that, although the trial court properly sentenced Beno to the maximum term on each count, the court erroneously ordered the sentences to be served consecutively. Id. at 924. In reaching its conclusion, the court noted that, although a trial court has discretion to impose both maximum and consecutive sentences, where a defendant is enticed by police to commit nearly identical crimes as a result of a police sting operation, consecutive sentences are inappropriate. Id. The Court revised the sentence to two enhanced terms of imprisonment to run concurrently. Id. In so doing, the court stated:

> Beno was convicted of committing virtually identical crimes separated by only four days. Most importantly, the crimes were committed as a result of a police sting operation. As a result of this operation, Beno was hooked once. The State then chose to let out a little more line and hook Beno for a second offense. There is nothing that would have prevented the State from conducting any number of additional buys and thereby hook Beno for additional crimes with each subsequent sale. We understand the rationale behind conducting more than one buy during a sting operation, however, we do not consider it appropriate to then impose maximum and consecutive sentences for each additional violation. If Beno, for instance, had sold drugs to different persons, or if he had provided a different type of drug during each buy, the consecutive sentences imposed might seem more appropriate. Here, however, because the

> crimes committed were nearly identical State-sponsored buys, consecutive sentences were inappropriate.

Id. at 924 (emphasis added.) Our Supreme Court has reaffirmed the Beno rule in Gregory v. State, 644 N.E.2d 543 (Ind. 1994) (manifestly unreasonable to run sentences consecutively for four counts of selling the same drug to the same police informant in a ten-day period). However, in Jones v. State, 807 N.E.2d 58, 69 (Ind. Ct. App. 2004), trans. denied, a panel of this Court found the Beno rule not applicable where less than all sentences were consecutive and the defendant did not receive the maximum possible aggregate sentence.

Here, Ramirez was enticed by the police, vis-à-vis the confidential informant, to make two sales of methamphetamine as part of a sting operation. However, his possession of cocaine with intent to sell was not due to police enticement. Nor did he receive maximum and consecutive sentences. We conclude that Beno does not require concurrent sentences in these circumstances.

Conclusion

Ramirez failed to demonstrate that his forty-five year sentence on Count II is inappropriate or that the imposition of consecutive sentences was erroneous.

Affirmed.

FRIEDLANDER, J., and KIRSCH, J., concur.